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In the Supreme Court of the United States

October Term, 1968

No. 918

OSCAR JOHNSON

vs.

HARLEYSVILLE MUTUAL INSURANCE COMPANY,

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND TO THE SUPERIOR COURT OF PENNSYLVANIA

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No.

Oscar Johnson

vs.

Harleysville Mutual Insurance Company,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner prays that a writ of certiorari issue to review the order of the Supreme Court of Pennsylvania entered on September 25, 1968 refusing a petition for leave to appeal to it from a decision of the Superior Court of Pennsylvania and of the Superior Court of Pennsylvania entered on March 20, 1968 affirming an order refusing to open a judgment entered by the Court of Common Pleas of Philadelphia County, Pennsylvania.

OPINIONS BELOW

The decision of the Court of Common Pleas of Philadelphia County, Pennsylvania dated October 11, 1967 is unreported and appears in this Petition as Appendix A at p. 50. The decision of the Superior Court of Pennsylvania dated March 20, 1968 is reported at 212 Pa. Sup. Ct. 89, 239 A. 2d 829 (1968), and appears in this Petition as Appendix B at p. 54. The order of the Supreme Court of Pennsylvania dated September 25, 1968 is unreported and appears in this Petition as Appendix C at p. 57.

JURISDICTION

The decision of the Court of Common Pleas of Philadelphia County, Pennsylvania dated October 11, 1967 refusing to open a judgment entered by the prothonotary of that court upon an award of an arbitrator was a final order appealable under local statutes to the Superior Court of Pennsylvania only because the amount in controversy established jurisdiction in that court. Act of June 24, 1895, P. L. 212, Sec. 7 (c) of May 5, 1899, P. L. 248, Sec. 1 of March 2, 1923, P. L. 3, No. 2, Sec. 1 of May 8, 1956, P. L. (1955) 1540, Sec. 1 as amended, 17 Purdon's Annotated Statutes, Sec. 184, Act of May 20, 1891, P. L. 101, Sec. 1, 12 P.S., Sec. 1100.

The decision of the Superior Court of Pennsylvania which was entered on March 20, 1968 is a final order from which no court proceeding of right exists in any state court. (17 Purdon's Annotated Statutes Sec. 190.) The order of the Supreme Court of Pennsylvania refusing a request by your petitioner for leave to appeal to it from the decision of the Superior Court of Pennsylvania is a final order from which no recourse lies to any state court and upon its entrance, all remedies available to your petitioner in the Commonwealth of Pennsylvania have been exhausted. The jurisdiction of the Supreme Court of the United States is invoked by your petitioner under 28 U.S.C. Sec. 1257 (3).

QUESTIONS INVOLVED

A corporation organized under Pennsylvania law and qualified to issue and sell policies of insurance in that state issues a policy to an insured who subsequently makes a claim under one of the endorsements in that policy required to be offered to all purchasers by a state statute. After negotiations fail, the matter is submitted to arbitration before an arbitrator appointed by the American Arbitration Association pursuant to an arbitration agreement contained in the policy. The arbitrator makes an award. The policyholder files the award as a judgment in the prothonotary of the local court of Common Pleas and the company files a petition in that same court for an order, under the local practice opening the judgment in order to allow it to file a petition for a review of the arbitrator's award as provided for by the state arbitration Act of 1927. The company files this petition in reliance upon the decision of the Supreme Court of Pennsylvania, the highest court in the state, rendered in an earlier case in which the company was involved, in which the Supreme Court of Pennsylvania had been asked to interpret the scope of the identical arbitration clause in issue in the instant litigation and in reliance specifically upon the Supreme Court of Pennsylvania's statement in that decision that in cases arising out of this arbitration clause, review could be had by filing a petition for review under the specific sections of the Pennsylvania Arbitration Act of 1927 which the company set up in its petition to open the

judgment. The lower court refuses to open the judgment. The Superior Court of Pennsylvania affirms the lower court decision and the Supreme Court of Pennsylvania refuses to allow an appeal.

1. Does it violate the Fourteenth Amendment of the United States Constitution for a lower, *nisi prius,* court of the state to refuse to afford to such a corporation the specific procedural relief which the highest court in the state has specifically granted to it in an earlier freely contested litigation involving the same insurance contract, the same endorsement and the same arbitration clause?

2. Does it violate the Fourteenth Amendment of the United States Constitution for an intermediate appellate court of the state, here the Superior Court of Pennsylvania, to refuse upon a writ of certiorari to order a lower court to enforce the specific procedural relief which the highest court in the state has specifically granted to a corporation in an earlier freely contested litigation involving the same insurance contract, the same endorsement and the same arbitration clause?

3. Does it violate the Fourteenth Amendment of the United States Constitution for the highest court in the state, here the Supreme Court of Pennsylvania, when a petition for leave to appeal to it from a decision of an intermediate appellate court, here the Superior Court of Pennsylvania, to refuse allocatur even though the petition for such sets out clearly and unambiguously a claim of denial of due process of law guaranteed by the Fourteenth Amendment, and a claim that such refusal violates the Pennsylvania Constitutional prohibition against impairment of obligations of contract, and a claim that a refusal

of such a review is a violation of the corporation's right to a jury trial guaranteed at some stage of an arbitration proceeding by local case law where the jurisdiction of an arbitrator has been challenged?

CONSTITUTIONAL PROVISIONS

The provision of the Constitution of the United States involved is Sec. 1 of the Fourteenth Amendment, U.S.C. Const. Amend. XIV, Sec. 1. The provision of the Pennsylvania Constitution involved is Purdon's Penna. Statutes Annotated, Const. Art. 1, Sec. 17. These provisions are printed in Appendix D, infra, p. 58.

STATEMENT OF THE CASE

A. The Background of the Lower Court Litigation

Harleysville Mutual Casualty Company now Harleysville Mutual Insurance Company, hereinafter called *the company,* is a corporation organized under the laws of the Commonwealth of Pennsylvania and qualified to write insurance policies in Pennsylvania and twenty-two other states of the Union. Effective January 23, 1964, the *company* issued a policy called a Family Combination Automobile Liability Policy in a standard form approved by the Insurance Commissioner of Pennsylvania to Oscar Johnson for a premium charge. This policy contained along with other endorsements one entitled "Protection Against Uninsured Motorist."

This latter endorsement is a relatively new type of coverage in which the insurer undertakes to pay the insured directly for all losses that he may suffer due to bodily injury which occurs as a result of an accident involving an uninsured motorist. The legislature of the Commonwealth of Pennsylvania has by statute required this type of coverage to be endorsed upon all automobile policies issued in the Commonwealth of Pennsylvania unless the insured rejects this coverage in writing. This legislative mandate can be found at 40 Purdon's Pennsylvania Statutes Annotated, Insurance Sec. 2000. A recently passed statute (November, 1968) has amended this provision,

making the coverage mandatory and removing the right of the insured to reject the coverage (Authority unavailable).

The standard policy which Mr. Johnson contracted for contained an arbitration clause as follows:

> "ARBITRATION. If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this Part, then, upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this Part."

On June 24, 1964 Mr. Johnson was involved in an accident with a party alleged to be an uninsured motorist. He started suit against this party in the local courts and subsequently made a claim for damages against his own insurance company, Harleysville Mutual Casualty Company, under the uninsured motorist coverage of his own policy. The latter action is the subject of the instant case.

Adjustment followed the claim; offers were made by the company to settle the claim which were not acceptable to Mr. Johnson and arbitration in the tribunals of the

American Arbitration Association under the arbitration clause of the contract was demanded.

An arbitrator heard testimony and eventually rendered his award. Mr. Johnson filed this award with the Prothonotary of the Court of Common Pleas of Philadelphia County, Pennsylvania as a judgment of record and issued attachment execution against the *company*.

Whereupon the *company* filed a petition under appropriate Rules of Civil Procedure of Pennsylvania to open the judgment in order to allow the company to file a petition under sections 7 and 10 of the Arbitration Act of 1927, 5 Purdon's Statutes Annotated Secs. 167 & 170, for a review of the arbitrator's findings.

This petition to open the judgment relied specifically upon a decision rendered by the Supreme Court of Pennsylvania in an earlier case, *Harleysville Mutual Casualty Company vs. Adair*, 421 Pa. 141, 218 A. 2d 791 (1966). In that case, which was a case of first instance in Pennsylvania, the identical arbitration clause quoted above and the same policy endorsement was construed by the Supreme Court.

The *Adair* case arose out of a demand for arbitration being made by an insured who had become an insured of the *company* as a result of his being assigned to it from an assigned risk pool. After *Adair* had become involved in an accident, he demanded arbitration under the policy contract. Prior to that he had refused to cooperate with the company or to supply any information except a brief statement dictated by his attorney and to submit to a physical examination which proved negative in all aspects.

After demand for arbitration was made, counsel for the *company* insisted upon exercising the rights the policy gave to the *company* to require the insured to submit to examinations under oath as to facts of the accident and of the damages claimed. *Adair* refused to answer any of a set of standard locally used interrogatories or to submit to examination under oath and insisted that the arbitration proceed. Counsel for the *company* refused to proceed. The arbitrator notified all parties that a hearing would be held *ex parte* unless the *company* did proceed. Whereupon counsel for the *company* brought an action in equity in the Court of Common Pleas of Philadelphia County seeking an injunction against *Adair*, the arbitrator and the American Arbitration Association until such a time as *Adair* should have complied with the requirements of the policy contract in regard to submitting to examinations under oath. The company vigorously contended in its argument, and later in its appellate brief and argument, that because arbitration awards were final and no review was available, it had to have an opportunity, preliminarily, to obtain information necessary to settle the case or to arbitrate the claim or it would be prejudiced.

The lower court refused to enjoin the arbitration. Whereupon the *company* appealed to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania refused to allow interlocutory process such as a suit for an injunction to interfere, preliminarily, with the conduct of an arbitration of an uninsured motorist claim. The Supreme Court further held that the issue was purely one of procedure and that since the Arbitration Act of 1927, Secs. 7 and 10, 5 Purdon's Statutes Annotated, Secs. 167-170 provided a completed method of statutory relief by ap-

peal to a court to vacate, modify or correct an award, recourse to equity was improper. The actual language used in the decision is as follows:

> "Finally, the Arbitration Act of 1927, supra, Secs. 7 and 10, 5 P.S. 167, 170, provide a complete method of statutory relief by appeal to the court to vacate, modify or correct an award where the arbitrators exceed their powers, or refuse to hear evidence or by misbehavior prejudice the rights of a party . . . "
>
> *Harleysville vs. Adair,* 421 Pa. 141 at 146, 218 A. 2d 791 (1966).

The headnotes appended to this decision in the report are entirely misleading and may be the source of much of the trouble which attends the instant case.

Despite the specific reliance by the *company* upon the procedural right granted to it in the *Adair* decision, to file a petition under Secs. 167-170 of the Arbitration Act of 1927 for a review of the arbitration award in the instant case, the lower court refused to open the judgment to allow it to do so. The lower court, probably reading only the headnotes of the *Adair* decision, held that *Adair* stood only for the proposition that an injunction restraining arbitration until after completion of pretrial discovery was properly dismissed and that the references to review of arbitration awards under the Arbitration Act of 1927 was dicta and not controlling. It chose to hold that clear dicta in the case of *Owens vs. Concord Mutual Insurance Company,* 210 Pa. Superior Ct. 235 (1967), to the effect that if the parties do not agree to apply the Arbitration Act of 1927 to arbitration proceedings, common law rules apply *was controlling* even in face of a specific holding in that

case that a party cannot submit to the jurisdiction of an arbitrator and then contest his jurisdiction.

After the decision, the *company* appealed to the Superior Court of Pennsylvania, an appellate court of limited jurisdiction. In its appeal to the Superior Court, the *company* raised again its contention that it had a procedural right as a result of the *Adair* decision to file a petition for review of the arbitrator's award. Among the arguments put forth, the *company* argued that to deny to it this right to a procedural remedy was a denial of due process of law under the Fourteenth Amendment of the United States Constitution and a violation of the prohibition against impairment of obligations of contract set out in the Pennsylvania Constitution and that access to the courts must be open to a litigant in an arbitration proceeding either initially or subsequently to the award or a serious denial of due process of law would ensue.

Despite this, the Superior Court of Pennsylvania refused to reverse the lower court and affirmed the lower court decision on a slightly different basis but refused to recognize the procedural right granted to the *company* in the *Adair* decision. The Superior Court of Pennsylvania relied, evidently, largely upon the headnotes of the *Adair* report and not on the thrust of that decision and on irrelevant later decisions of the Supreme Court of Pennsylvania.

Thereupon, the *company* filed a petition with the Supreme Court of Pennsylvania for leave to appeal to it from the decision of the Superior Court of Pennsylvania. Such an appeal is not a matter of right but of sufferance under local statutes.

In this petition for allocatur to the Supreme Court of Pennsylvania, the *company* again set out its reliance

upon the Supreme Court of Pennsylvania's holding in *Adair* and argued that there was an apparent conflict between that decision and the decision of the Superior Court of Pennsylvania in *Owens vs. Concord Mutual Insurance Company* (cited supra). The contention that the refusal of the lower court and the Superior Court of Pennsylvania to implement the procedural relief described in *Adair* had denied to the *company* due process of law guaranteed by the Fourteenth Amendment of the United States Constitution and had resulted in an impairment of obligations of contracts contra to the provisions of the Pennsylvania Constitution was clearly and forceably set out in this petition for allocatur.

On September 25, 1968 in a *per curiam* order without an opinion, the Supreme Court of Pennsylvania refused allocatur. This order is printed herein as Appendix C, p. 57.

Your petitioner sought a supersedeas from the Superior Court of Pennsylvania which was refused on November 1, 1968. This order is printed herein as Appendix E, p. 59.

Your petitioner sought a supersedeas from the circuit justice of the United States Supreme Court under United States Supreme Court Rule 27. This application was refused by Mr. Justice Brennan on November 13, 1968. The notice of this order is printed herein as Appendix F, p. 60.

Whereupon the *company* paid Mr. Johnson, the plaintiff in the instant case, the full award, all accrued interest, all costs including the costs of printing the appellate briefs and now seeks a writ of certiorari from the Supreme Court of the United States to review the actions of the

lower court, the Superior Court of Pennsylvania and of the Supreme Court of Pennsylvania, which have, by unsophisticated and crude interpretations of a decision granting it a right to a specific procedural relief, denied to your petitioner elemental justice by refusing to enforce that right and then, in the specific instance of the Supreme Court of Pennsylvania, by quite effectively, although ignobly, extinguishing that procedural right by silence.

B. The Case Concerns a Matter of General Importance

As stated in part A above, all automobile liability policies issued by any company in Pennsylvania must carry an uninsured motorist endorsement. The vast majority of these policies contain an arbitration clause essentially the same as the one involved in this case. These policies number into the millions. The petitioner's policies containing the arbitration clause involved in this case alone run into the hundreds of thousands.

C. Jurisdiction of the Court Is Invoked Under 28 U.S.C. 1257(3)

A constitutional right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution was set up originally and inherently by the filing of a petition to open the judgment entered on the award of an arbitrator in reliance on the decision of the Supreme Court of Pennsylvania in the case of *Harleysville vs. Adair* (cited above) and in conformity with standard Pennsylvania practice rules. It could not be anticipated at that time that the lower court would choose to misinterpret the *Harleysville vs. Adair* (cited above) decision so as to deprive your petitioner of a specific procedural remedy granted by the highest court of the State.

After the lower court refused to open the judgment, your petitioner specifically raised the concept of denial of due process of law and impairment of obligations of contract in its assignment of error and in its brief submitted on appeal to the Superior Court of Pennsylvania. The Superior Court of Pennsylvania ignored the constitutional issue. The assignment of error can be found in the statement of questions involved and in argument IV and V of the appellate brief on appeal printed, submitted and argued before the Superior Court of Pennsylvania and collected in the Paper Books appendix to the official report of the decision in *Johnson vs. Harleysville Mutual Casualty Company*, 212 Pa. Superior Ct. 89, 239 A. 2d 829 (1968).

After the Superior Court of Pennsylvania affirmed the judgment of the lower court by its decision dated March

20, 1968, your petitioner filed a petition for leave to appeal with the Supreme Court of Pennsylvania since there exists under Pennsylvania law no right to appeal to that court from a decision of the Superior Court of Pennsylvania. In the petition for allocatur directed to the Supreme Court of Pennsylvania, your petitioner specifically raised the issue of denial of due process of law and the impairment of obligations of contract in Point One for Appeal, Point Two for Appeal, Point Three for Appeal and Point Six for Appeal. A copy of this petition for allocatur can be found in the official transcript of the Record of the Supreme Court of Pennsylvania filed in this case (R. 2).

Your petitioner feels that the claim of constitutional rights was timely raised; but in addition, it relies upon the case law which holds that even aside from the formal precise raising of claims for constitutional privilege, a claim is properly raised if it is raised as soon as the imminent deprivation of the privilege is threatened by the actions of a state court.

Great Northern Railway Co. vs. Sunburst Oil and Refining Co., Mont. 1932, 53 S. Ct. 145, 287 U.S. 358, 77 L. Ed. 360;

Brinkerhoff-Farris Trust and Savings Co. vs. Hill, Mo. 1928, 50 S. Ct. 451, 281 U.S. 673, 74 L. Ed. 1107;

International Harvester Co. vs. Missouri, Mo. 1914, 34 S. Ct. 859, 234 U.S. 199, 58 L. Ed. 1276, 52 L.R.A. N.S. 525;

Missouri ex rel. Missouri Insurance Co. vs. Gehner, Mo. 1930, 50 S. Ct. 326, 281 U.S. 313, 74 L. Ed. 870.

D. Petitioner Contends That the Actions of the State Courts Have Impaired the Obligations of Contract and Violated Its Right to Due Process of Law

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Your petitioner emphatically states that it is *not* contending that a reversal by a State appellate court of its former holding has violated the constitutional guarantee against impairment of obligations of contract. It is cognizant of the holdings that such reversals of decisions do not constitute such a violation of the constitutional guarantee contained in both the United States and the Pennsylvania Constitution.

Your petitioner does contend, however, that it has suffered a serious impairment of obligations of contract nevertheless as a result of the actions of the Court of Common Pleas of Philadelphia County and the Superior Court of Pennsylvania in refusing to allow it to pursue a specific method of procedural relief to obtain a review of the award of the arbitrator under the Pennsylvania Arbitration Act of 1927 which the Supreme Court of Pennsylvania had granted to it in the *Harleysville vs. Adair* decision (cited above).

No lower court can so deprive a citizen of a right to relief by undertaking to reinterpret a decision of the highest court of the state and labelling a clear and unambiguous holding dicta. It is in doing such a thing as this that these state courts have denied your petitioner due process of law and thereby have impaired the obligations of your petitioner's contracts both under the Fourteenth Amendment of the United States Constitution and under Article I, Section 17 of the Pennsylvania Constitution.

Likewise, it is in the refusal of the Supreme Court of Pennsylvania to grant an allocatur despite the fact that your petitioner raised a claim of constitutional privilege both under the Fourteenth Amendment of the United States Constitution and under Article I, Sec. 17 of the Pennsylvania Constitution that an injustice has been worked upon your petitioner and valuable contract rights have been capriciously impaired.

Your petitioner emphasizes that it is not claiming that the Supreme Court of Pennsylvania cannot reverse itself. It is claiming that despite your petitioner's efforts to obtain review *it did not,* and it has not reversed itself on its holding in *Harleysville vs. Adair* (cited above), and until it does, no lower court has a right to refuse to grant the relief that the *Harleysville vs. Adair* (cited above) decision granted to your petitioner.

The thrust of the above argument has already been recognized by the Supreme Court of Pennsylvania, *Sinking Fund Commissioners of Philadelphia vs. Philadelphia et al.,* 324 Pa. 129, 134, 188 A. 314 (1936). In this case the Supreme Court of Pennsylvania stated that: "That which constitutes an impairment of the obligation of the contract may also constitute a deprivation of due process." That, "In both property rights may suffer." And that, "Therefore no order can be made by a court in the enforcement of a judgment which would, in violation of 'due process' take from a litigant substantial property rights—rights which may likewise be secured for him from legislative interference by the impairment of obligations clause of the Constitution."

The mere fact that the issue arises in civil litigation does not limit the application of the due process concept.

New York Times vs. Sullivan, N.Y., 1964, 84 S. Ct. 710, 376 U.S. 254, 11 L. Ed. 2d 686, 95 A.L.R. 2d 1412.

The Supreme Court of Pennsylvania by refusing allocatur does not in its own philosophy of law regard such a refusal as an affirmation of the holding of the Superior Court of Pennsylvania. It determines on its own whether to allow an appeal or not to allow an appeal and there is no inference permissible therefrom that a refusal of such a leave to appeal has expressed a concurrence of the Supreme Court of Pennsylvania. *Kraemer vs. Guarantee Trust, etc. Co.,* 173 Pa. 416, 33 A. 1047 (1896).

Therefore, since *Harleysville vs. Adair* (cited above) still stands, the rights granted under it must be enforced by lower courts in Pennsylvania.

The Supreme Court of Pennsylvania has in addition held specifically that courts of the State cannot impair obligations of contract any more than the legislature can and that the Pennsylvania Constitutional prohibition applies to court decisions. *Farber vs. Perkiomen Mutual Insurance Co.,* 370 Pa. 480, 88 A. 2d 776 (1952). See also *Philadelphia Trust vs. Northumberland County Traction Co.,* 258 Pa. 152, 101 A. 970 (1917); and *Galey vs. Guffey,* 248 Pa. 523, 94 A. 238 (1915).

The Supreme Court of Pennsylvania has recognized in its decisions the very argument that counsel for your petitioner made before the Superior Court of Pennsylvania on appeal that in order to understand the *Harleysville vs. Adair* decision, the full thrust of the litigant's argument must be considered. *Pew Trust,* 411 Pa. 96, 191 A. 2d 399 (1963).

In discussing dictum and its meaning, the court said,

> "Appellant is correct when he terms the aforesaid statement 'dicta,' *but so far as concerns the Pennsylvania Rule of Equitable Apportionment of extraordinary dividends and proceeds of sale of stock* which the majority therein abolished, it is as controlling as if it were an indispensable part and parcel of the precise decision of the court on the actual issues in the Catherwood Trust. Dictum which is contained in an Opinion and not in a footnote, is sometimes as strong and controlling as a decision on the merits; indeed Opinions containing dicta are sometimes more carefully and thoroughly considered than some Opinions which are restricted solely to the merits and others which are 'Per Curiam.'" (Emphasis by the Court.)

The court goes on to discuss outstanding cases on controlling dicta in *Commonwealth vs. Drum,* 58 Pa. 9; *Nirdlinger's Estate,* 290 Pa. 457, 139 A. 200, and *Waterhouse's Estate,* 308 Pa. 422, 162 A. 295, saying that these were cases where the court set up clear guide posts by means of dicta.

These views are old and well established. The Supreme Court of the United States has expressed like ideas. Chief Justice Marshall expressed them in the very early days of the Union. *Cohens vs. Virginia,* U.S. 1821, 6 Wheaton 264, at 399, 5 L. Ed. 257; see also *Weyerhaeuser vs. Hoyt,* 8th Cir., 1910, 31 S. Ct. 300, 219 U.S. 380, 55 L. Ed. 258.

This is the very gist of your petitioner's argument already recognized by the Supreme Court of Pennsylvania in its own decisional law. Yet when your petitioner re-

quested the Supreme Court of Pennsylvania to grant it leave to appeal a decision of the Superior Court of Pennsylvania (Appendix B, p. 54) in the instant case on the basis of this decisional law, the Supreme Court of Pennsylvania refused to do so (Appendix C, p. 57). This is fundamental unfairness and a denial of due process of law under the Fourteenth Amendment of the United States Constitution.

E. Arbitrations That Are Held in the Accident Claims Tribunal of the American Arbitration Association by Virtue of Submission Under the Uninsured Motorist Endorsement of the Standard Automobile Liability Policy Issued Within This Commonwealth Are Arbitrations Under the Pennsylvania Arbitration Act of April 25, 1927, P. L. 381, 5 P.S. 161 et seq.

The Supreme Court of Pennsylvania in the decision in the case of *Harleysville Mutual Casualty Company, App. vs. Adair,* 421 Pa. 141, 218 A. 2d 791 (1966), held, *inter alia,* that arbitrations held within the accident claims tribunal of the American Arbitration Association by virtue of submissions under a written agreement to arbitrate the issues of the liability of the alleged uninsured motorist and the damages which the insured had suffered as a result of the uninsured motorist's negligence contained in the uninsured motorist endorsement of the standard automobile liability policy written in the Commonwealth of Pennsylvania were arbitrations subject to the Pennsylvania Arbitration Act of April 25, 1927, P. L. 381, 5 P.S. 161 et seq. and that the parties to such an arbitration had a right *after the arbitration proceedings had terminated* to appeal to the Court of Common Pleas under the arbitration act to vacate, modify or correct an award. The court cited Sections 167 and 170 of the Arbitration Act as the sections under which such an appeal could be filed.

Section 169 (5 P.S. 169) of the Arbitration Act is entitled "Motion to Confirm Award, Jurisdiction, Notice," Section 170 (5 P.S. 170) of the Arbitration Act is entitled "Motion to Vacate Award, Grounds, Rehearing." In Sec-

tion 170 four (4) grounds are set out under which relief can be sought under the Arbitration Act. The appellant in its rule and petition to the Court of Common Pleas in the instant case specifically asked the court to open the judgment which had been obtained by the appellee by filing the arbitrator's award in the Prothonotary of the Court of Common Pleas of Philadelphia County so that the appellant could file a petition under Section 170 of the Arbitration Act as the Pennsylvania Supreme Court said it could do after the termination of the arbitration hearing and the rendition of the award. The lower court despite the citation of this authority refused to open the judgment holding that the arbitration under the uninsured motorist endorsement was a common law arbitration.

In its opinion (Appendix A, p. 50), the lower court recognized that the decision in *Harleysville Mutual Casualty Company vs. Adair,* supra, does state that the Arbitration Act of 1927 does provide a method of statutory relief but chose to consider this language dictum. The lower court felt constrained by the holding of the Superior Court in *Owens vs. Concord Mutual Insurance Company, App.,* 210 Pa. Superior Ct. 235, 232 A. 2d 14 (1967).

In the *Owens vs. Concord Mutual* case the discussion relative to the Arbitration Act which occurs in the middle of page 238 is itself clear dictum. Dictum has generally been held to be

> ". . . that which is said in passing; a rule of law set forth in a court's opinion, but not involved in the case; what is said by the court outside of the record or on points not necessarily involved therein . . ."
>
> *Law Dictionary, Ballentine,* 1948 Ed.

The reference to the Arbitration Act in *Owens vs. Concord Mutual,* supra, is in no way the basis of that decision. The decision would be the same were the Act held to apply or not as the Court intimates at the top of page 238 of the decision because the case turns on the principle of choice of forum and remedy. The principle for which the case stands is clearly enunciated in the last two lines of the majority decision (page 239) which reads:

> "... The company's participation in the arbitration proceedings operates as a waiver of procedural defects ... It cannot appear in the arbitration proceedings and if unhappy with the award, attempt to litigate all matters the second time before the courts."

In *Owens vs. Concord Mutual,* supra, the company was not seeking a review of the award for irregularities in the arbitration, it was attacking the very jurisdiction of the arbitrator *after* it had submitted to his jurisdiction.

In contradistinction to this type of situation, in the *Harleysville vs. Adair* case, supra, the reference to the Pennsylvania Arbitration Act of 1927 by the Supreme Court is specifically tied into the very remedy which the appellant there was seeking. In the *Harleysville vs. Adair* case, supra, the company sought the aid of equity. *Why?* As counsel repeatedly stated in the lower court as well as before the Bar of the Supreme Court of Pennsylvania because the award of the arbitrator was final. This is why when information that the company needed to prepare for a hearing would not be given by the claimant, the company sought the assistance of the equity court to restrain the holding of the arbitration hearing until that information required by terms of the policy contract could be secured.

The company felt that if it went ahead it would be helpless once the award had been entered by the arbitrator to alter the result short of collusive fraud approaching criminality on the arbitrator's part. The Supreme Court knew that this point, *the finality of the award,* was the issue. The Court, however, was reluctant to allow interlocutory rulings to interrupt a procedural scheme. We can read at page 145 of the *Harleysville vs. Adair* decision, supra:

> "To permit an equity action to be brought to restrain an arbitration proceeding in toto or to obtain declaratory judgments as to procedural matters because of dissatisfaction with an interlocutory ruling of the arbitrator would be unthinkable. No such injunctive or declaratory judgment process is available in an ordinary civil action at law as a means of challenging an interlocutory ruling by the court."
>
> *Harleysville Mutual Casualty Company vs. Adair,* 421 Pa. 141, at 145, 218 A. 2d 791, 1966.

The analogy here is to ordinary court process. What would not be tolerated in an ordinary court process would not be tolerated in an arbitration scheme. Does this, then, mean that the parties to such a sophisticated arbitration scheme as uninsured motorist arbitration where skillful attorneys represent claimants and companies before equally skillful attorneys sitting as arbitrators, where all the techniques of trial are employed, witnesses examined at length under oath, physicians interrogated on treatment, diagnosis and prognosis are without any remedy because the equity process and declaratory judgment process are not available during the arbitration? Not at all! Because as the Supreme Court says two paragraphs after the above quoted portion:

"Finally, the Arbitration Act of 1927, supra, §§7 and 10, 5 P.S. §§167, 170, provide a complete method of statutory relief by appeal to the court to vacate, modify or correct an award where the arbitrators exceed their powers, or refuse to hear evidence or by misbehavior prejudice the rights of a party . . ."

Harleysville vs. Adair, 421 Pa. 141 at 146, 218 A. 2d 791, 1966.

To hold as the lower court does that the latter quote is dictum and the reference to the Arbitration Act in *Owens vs. Concord Mutual,* supra, is a holding that fetters the present appellant in his attempt to pursue his remedies under the Arbitration Act is clear error not only in law but in logical analysis. From the time of the Roman jurists if not before, through Aquinas and the scholastics, through the King's Bench, through the long history of the Pennsylvania Supreme Court, the inheritor of the King's Bench traditions and power it has always been held that rights and remedies are coordinate. In *Harleysville vs. Adair,* the company sought to exercise a remedy via the equity court to protect a right under a contract. The Supreme Court of Pennsylvania refused to allow that right to be protected in an equity action started in the midst of an uninsured motorist arbitration but it stated that that right could be protected by an application under the Pennsylvania Arbitration Act of 1927 by a motion to vacate, modify or correct the award. This is all your petitioner tried to do in this case, and the courts of Pennsylvania thwarted it at every turn by manipulating ideas clear on their face to achieve a result not consonant with the thrust of those ideas.

A State Supreme Court which, quite simply, says that: "No, sir! you do not have the right to enjoin that arbitration proceeding now since it has already started despite your claim of prejudice; what you can do is go through with the arbitration and *then* file a petition under the Arbitration Act of 1927 to obtain a review of the arbitrator's findings," is indulging in sophistry when the person to whom that instruction has been given does just that!—submits to an arbitration and then attempts to obtain a review of the award of the arbitrator under the sections of the Arbitration Act of 1927 and the lower courts refuse to implement the remedy and then the same State Supreme Court refuses to open the doors of its courtroom to such a person. Yet this paraphrase is almost precisely what has happened to your petitioner in the instant case. One is reminded of the Mad Hatter's rejoinder to Alice that words mean what you wish them to mean.

If instead of your petitioner being an insurance company, it were an individual and if instead of your petitioner being involved in a civil matter involving money, it were involved in a criminal matter or a civil right matter there is little doubt in counsel's mind that this Court would be appalled at the arbitrariness of the proceedings of which review is here sought. And yet, is not the basic constitutional right to due process of law equally as applicable to civil procedure? And is not its erosion in the civil procedure as detrimental to the common weal as its erosion anywhere else?

F. The Decision in Harleysville vs. Adair Is Not in Conflict in Any Way With the Pennsylvania Case Law That Has Been Developed in Regard to Arbitration in Pennsylvania

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If the cases since the passage of the Pennsylvania Arbitration Act that have construed it or discussed its applicability or inapplicability to a situation are analyzed, it is clear that the Supreme Court has recognized that both statutory arbitration and common law arbitration exists. Whether a given arbitration is held to have been one or the other of the arbitration forms depends upon factors inherent in the submission of the dispute. Some cases off-handedly state that if the Arbitration Act is not specified as applying to the arbitration then the arbitration is a common law arbitration. (*Owens vs. Concord Mutual* (cited above).)

But that is not, nor has it ever been the rule. It is only part of the rule. The other part which for some reason does not get as much publicity as the above is that reiterated by the Supreme Court as recently as in the decision in *John A. Robbins Company, Inc. vs. Airportels,* 418 Pa. 257, 210 A. 2d 896 (1965), that the common law form of arbitration exists *absent* a specific agreement referring to the Arbitration Act *unless the parties expressly or by implication agree that the act applies* (page 261 of decision).

In the *Robbins vs. Airportels* case, supra, the court cites four cases as the authority for this distinction. Two are Federal cases arising in District Courts in the Eastern and Western Districts of Pennsylvania.

Hartmann Coal Mining Co. vs. Hoke, 157 F. Supp. 313 (E.D. Pa. 1957), turns on the lack in the record before the court of anything that would indicate that the arbitration proceeding was had in conformity with the Pennsylvania Arbitration Act of 1927 and therefore the Court withheld a decision on the motion to dismiss and the contra motion for summary judgment in order to give the plaintiff therein a chance to prove that the Court had jurisdiction.

A. J. Curtis Co. vs. D. W. Falls, Inc., 305 F. 2d 811 (3rd Cir. 1962), another case which turns on jurisdiction of the Federal Court, is also enlightening on its facts. The case concerns an agreement between two parties to a commercial enterprise which failed and being unable to settle the accounts between them, the parties invoked the arbitration clause in their agreement. The arbitration clause itself provided for a selection by the parties of the arbitrators (page 812 of the decision). The agreement did not mention the Pennsylvania Arbitration Act. The arbitrators, by majority vote, made an award. The dissenting arbitrator filed a dissenting opinion. The award was filed with the Prothonotary of a County Court of Common Pleas. "There was no action taken in the said court by either the appellant or the appellees." (page 813). Later A. J. Curtis and Co. sought removal of the case to the Federal jurisdiction. The appellate court (3rd Cir.) citing Pennsylvania cases held that in addition to the fact that the agreement in the joint ventures contract failed to mention the Pennsylvania Arbitration Act of 1927 *the parties did not follow the statutory procedure* (page 813 of decision) and that this would have been fatal in a removal action even if the agreement had

been one within the scope of the Pennsylvania Arbitration Act of 1927. Neither party had taken any action in the local court or conducted the arbitration in any form recognizable under the act and therefore since there was nothing to indicate anything on the local level except a common law arbitration, it could not be argued upon removal to the federal jurisdiction that it was a statutory arbitration. Here again the form and conduct of the arbitration is the key.

Freeman vs. Ajax Foundry Products, Inc., 398 Pa. 457, 159 A. 2d 708 (1960), per curiam affirmance on the opinion in 20 Pa. D. & C. 2d 128 (1959), was a case where an inventor and a manufacturer entered into a commercial venture to manufacture and sell a device. The agreement contained an arbitration clause. The court, after a long discussion of the law in Pennsylvania that has arisen in regard to arbitration, held that it was not necessary to determine whether the arbitration held under the royalty agreement was under the Pennsylvania Arbitration Act or at common law because there was nothing in the record to indicate that the arbitration was *intended* to be under the Act (page 134 of decision). Neither party tried to follow the act, in short.

Finally—the Supreme Court of Pennsylvania cites the case of *Harwitz vs. Selas Corporation of America,* 406 Pa. 539, 178 A. 2d 617 (1962), as authority for the proposition that we must look to see whether the parties have expressly or by implication further agreed that the Arbitration Act shall govern. This is the final case cited in the *Robbins vs. Airportels* case discussed above. The *Harwitz vs. Selas Corporation* case concerned a labor relations problem, union grievance procedure and a litigious employee.

The Pennsylvania Supreme Court remarked (pages 542-543 of Pennsylvania decision):

> "A careful review of the record convinces us that the court below was correct when it concluded that 'because the parties did not follow in any particular the procedure outlined in the Arbitration Act of April 25, 1927 . . . and because there is no evidence, it is manifest that the award of the arbitrators was a common law award'. . . ."

The case of *Goldstein et al. vs. International Ladies' Garment Workers' Union,* 328 Pa. 385, 196 A. 43 (1937), a frequently cited case in this field, gives a clue to the reason why the Pennsylvania Supreme Court has been reluctant to say as it did in *J. M. Davis Company vs. Shaler Township,* 332 Pa. 134, 2 A. 2d 708 (1938), that after the passage of the Arbitration Act *all* arbitrations must be considered as being held under the terms of the act. At page 393 of the *Goldstein* decision we can read:

> "Apart from the fatal failure to observe the provision of the Arbitration Act of 1927 in this respect, [this respect refers to a proper determination by a court if applied to of the arbitrator's jurisdiction and power to decide certain issues] the fact is as already indicated, that that act is not adaptable to controversies in which the relief sought is in the nature of a mandatory decree. . . ."

But this reluctance to apply the *Davis vs. Shaler Township* case should not be interpreted as a prejudice against the Pennsylvania Arbitration Act nor its application. The Pennsylvania Supreme Court has repeatedly

stated that the Pennsylvania Arbitration Act provides a "more effective remedy."

> *Isaac et al. vs. Donegal & Conoy Mutual Fire Insurance Co.*, 301 Pa. 351, at page 357, 152 A. 95 (1930);
>
> *Goldstein et al. vs. International Ladies' Garment Workers' Union*, 328 Pa. 385, at page 395, 196 A. 43 (1937);
>
> *J. A. Robbins Co., Inc. vs. Airportels, Inc.*, 418 Pa. 257 at page 260, 210 A. 2d 896 (1965).

It is interesting that the case usually cited as limiting *Davis vs. Shaler Township*, supra, the *Isaac et al. vs. Insurance Co.* case (301 Pa. 351, 152 A. 95), was itself distinguished by the court speaking through Mr. Justice, later Chief Justice Maxey in the following way in the *Davis v. Shaler* case, supra:

> ". . . In the instant case the submission to arbitration *pursuant to the Act of 1927* [and this submission was by virtue of legislative act since the act was not mentioned in the arbitration agreement] adopts that act's provisions for filling vacancies and therefore the case cited in inapplicable. [The case cited being Wolf v. Augustine, 181 Pa. 576, 37 A. 574.] Appellant also cites Isaac et al. vs. Insurance Co. . . . That case holds in respect to the Arbitration Act of 1927 that the act is not exclusive but does provide a more effective remedy of prosecuting arbitration agreements. *The instant case is an example of the 'more effectiveness' of the 1927 arbitration 'remedy.'* " (Emphasis and parenthetical comments supplied.) (Page 139.)

The Court of Common Pleas of Washington County, Pennsylvania in considering "Uninsured Motorist Coverage" held that arbitrations provided for in the standard uninsured motorist endorsement of the approved automobile liability policy are arbitrations subject to the Act of 1927 specifically because it is a more effective remedy and it is to be preferred. *Koslowski vs. Pennsylvania Threshermen, etc.*, 42 Wash. Co. 76, 77 (1963). It is in this vein of thinking that the decision in *Harleysville vs. Adair,* supra, placed the uninsured motorist arbitration agreement under the Arbitration Act of 1927 and granted the parties the right to file petitions under appropriate sections of the Arbitration Act of 1927 to vacate, modify or correct an award.

G. For a Court To Refuse To Apply Decisions That Have Already Construed the Meaning of a Statute That Affects Contractual Remedies Is To Impair the Obligations of Contract Contra to the Pennsylvania Constitution and Is a Denial of Due Process of Law Guaranteed by the Fourteenth Amendment of the United States Constitution

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The very case in which the Pennsylvania Arbitration Act of 1927 (cited above) was held to be constitutional, *Katakura & Company, Ltd. vs. Vogue S. H. Co., Appellant,* 307 Pa. 544, 161 A. 529 (1932), would have, had the criteria applied by the lower court in the instant case been there applied, been thrown out of court.

In the *Katakura vs. Vogue* case, supra, a foreign seller brought a petition under the Pennsylvania Arbitration Act to compel a buyer who would not pay for merchandise sent to it to submit to arbitration before the Silk Association of America, Inc., a trade association organ, in the silk industry. Despite the fact that counsel for the buyer, Vogue, advanced argument after argument contesting the applicability of the Pennsylvania Arbitration Act of 1927, the court had no difficulty at all in holding that the Act not only was constitutional but that a petition by one party to the controversy under the *Pennsylvania Arbitration Act* invoked the machinery of the Act. If the paper books of the appellant in *Katakura vs. Vogue,* supra, are read, there cannot be a "scintilla" of doubt that *Vogue Silk Hosiery Company,* the defendant, and the appellant upon appeal did contest, refuse, and with all the expletives at the command of its counsel reject the Arbitration Act, reject the applicability of that Act to the controversy, reject the machinery of that Act as a way of solving the

dispute between the parties and reject that Act as a violation of a Constitutional right to a trial by jury under the Pennsylvania Constitution, Article 1, Section 6, P.S. Const. Vol. I, Art. 1 to 4.

In *J. A. Robbins Co., Inc. vs. Airportels, Inc.,* 418 Pa. 257, 210 A. 2d 896 (1965), the Supreme Court of Pennsylvania in rejecting an argument by counsel that since Airportels, Inc. had by counsel stated at the outset of the arbitration proceeding that it was proceeding in the hearing under the Arbitration Act of 1927, the Act applied in regard to the procedures for filing the award and for review states that the ". . . appellee does not cite and we do not know of any case where the unilateral act of one of the parties made the Act of 1927 applicable . . ." (at page 262). The Court need only refer to the *Katakura vs. Vogue Silk Hosiery Co.,* the very case that determined the Act's constitutionality for such a case.

It is interesting to note that the Constitutional question arose again in the *Davis vs. Shaler Township* case (cited above) and that the Pennsylvania Supreme Court in the *Shaler* decision ties in the constitutionality of the Pennsylvania Arbitration Act of 1927 to the concept of "obligation of contract" citing from *Beaver Co. B. & L. Association vs. Winovich,* 323 Pa. 483, at 489, 187 A. 481:

> "In determining what constitutes the obligation of a contract, no principle is more firmly established than that the laws which were in force at the time and place of the making of the contract enter in its obligation . . ."

The Pennsylvania Supreme Court has held that judicial acts can also be or result in an impairment of ob-

ligation of contract, that the concept does not only apply to legislative action. *Farber vs. Perkiomen Mutual Insurance Co.,* 370 Pa. 480, 88 A. 2d 776 (1952), at page 486, after reviewing the actual cash value clauses of the standard fire policy said:

> "... The legal meaning of that clause having been determined and established by prior decisions of this court, we cannot now depart therefrom without impairing the obligation of the contracts as written ..."

Likewise in *Philadelphia Trust Company v. Northumberland County Traction Co.,* 258 Pa. 152, 101 A. 970 (1917), a much earlier case, the Pennsylvania Supreme Court stated a similar principle at page 166:

> "The constitutional provision, federal and state, forbidding the impairment of the obligation of contracts, lays its hand on the legislative department of the government, but the principle has like force when invoked for a similar purpose in the judicial department. ..."

Aside from the doctrine of *stare decisis* which would suggest as the present Chief Justice did in his concurrence in *Evans vs. Moffat,* 388 Pa. 559, 131 A. 2d 141 (1957), that a court should follow a decision that has been made in a subsequent case where the facts are similar; the Pennsylvania Supreme Court has already applied the principle of "obligation of contract" to the Pennsylvania Arbitration Act of 1927. It has approved the principle set out in *Beaver Co. B. & L. Association vs. Winovich* (cited above and quoted above) as this principle was applied to the Pennsylvania Arbitration Act by the court in the *J. M. Davis vs. Shaler Township* case (cited above). The Su-

preme Court also cited *Fischer & Porter Co. vs. Porter,* 364 Pa. 495, 72 A. 2d 98, quoting from that decision: "'the terms of a contract requiring the application of a statute are to be construed according to their meaning as used in the statute:'" see: *Evans vs. Moffat,* 388 Pa. 559, 131 A. 2d 141 (1957) at page 565, for this discussion.

Your petitioner had every right to rely on the construction that the appellate courts had already given to a statute especially when the thrust of that statute affected basic contractual rights. A court has no warrant by labelling an appellate decision, *dictum,* to deprive a party before it of rights to remedies which these decisions have granted to it. To do so is to impair the obligation of contract in violation of the Pennsylvania Constitution and is a denial of due process of law guaranteed by the United States Constitution.

Insurance policy endorsements and coverages are drafted with the exception of those of a few very large national companies by national bureaus of underwriters. The clear intent of this type of drafting is to allow, wherever possible, for the incorporation of local contract and tort law into the contract. It is an almost commonplace assumption that those laws of a state whose thrust alters or molds the rights, duties and remedies set out in the contract agreement are incorporated into that contract when it is made. It may be a more subtle concept but it is no less true that those statutory interpretations which are made during the life of a contract or during the exercise of rights or remedies arising out of a contract by the Pennsylvania Supreme Court which construe the words of a contract pertaining to the rights, duties and remedies set out therein are also incorporated into a contract. And

when, for instance as in *Harleysville vs. Adair* (cited above) and as in the cases cited by your petitioner in section G of this petition, an Act of the Legislature of Pennsylvania is construed so as to confer the rights and remedies of that Act, in this case the remedies of the Arbitration Act of 1927, to a particular type or class of contracts, in this case contracts of insurance containing a legislatively required uninsured motorist endorsement, it is a violation of the prohibition contained in the Pennsylvania Constitution against impairment of obligations of contract and a denial of due process of law guaranteed by the Fourteenth Amendment of the United States Constitution for a lower court to ignore those decisions or to undertake a reinterpretation of the statute as it applies to this class of cases even if such a court if it had the statute before it in an original action would be free to do so. The above references to constitutional provisions are: Pennsylvania Constitution of 1874, P.S. Const., Art. 3, Sec. 17, and United States Constitution, U.S.C.A. Amend. XIV, Sec. 1.

H. A Party to an Arbitration Must Have Access to the Courts at Some Stage. If He Cannot Challenge Jurisdiction at the Beginning or During the Process, He Must Under Due Process Concepts Be Able To Make His Challenge at the End or When the Award Is Filed

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In addition to the constitutional argument set out in part G above another element of basic unfairness that denies to the appellant and likewise to other claimants and respondents to demands for arbitrations under the uninsured motorist endorsement of the standard automobile liability policy issued in the Commonwealth of Pennsylvania arises out of the apparent conflict between the *Harleysville vs. Adair* and the *Owens vs. Concord Mutual* cases, supra (both cases cited above).

Assuming that *Owens vs. Concord Mutual,* supra, stands for the proposition that uninsured motorist arbitrations are common law proceedings for the sake of discussion, we have the anomalous situation wherein a party to an uninsured motorist arbitration proceeding in the Accident Claims Tribunal of the American Arbitration Association would be left without any judicial remedy for any irregularity in the form or substance of such an arbitration. When the arbitration clause of the policy was written it was never intended by the use of the term "binding" to abrogate and cast aside all judicial remedy. In what manner shall the company raise the issue of the jurisdiction of the arbitrator who abrogates to himself the right to make policy coverage determinations well beyond the scope of the matters submitted to him by the arbitration agreement? If *Harleysville vs. Adair* (supra) is fol-

lowed, the company has no right to a declaratory judgment action and no right to seek the aid of the injunctive powers of the equity court during the arbitration. And under *Owens vs. Concord Mutual,* supra, the company has no right to seek a review of the award except for fraud and collusion. The company, and a similar thing could happen to a claimant, would be lashed tight to the dock with a legal "clove hitch."

This is an intolerable state of affairs. It is fundamentally unfair and a denial of the right to procedural due process of law guaranteed to every person, corporate or individual, by virtue of the Fourteenth Amendment of the United States Constitution, U.S.C.A. Const. Amend. XIV, Sec. 1.

This constitutional issue has, itself, been recognized to exist in arbitration situations by the Pennsylvania Supreme Court. In *Goldstein et al. vs. International Ladies' Garment Workers' Union,* 328 Pa. 385, 196 A. 43 (1937), at page 392, where a claim was made by one party to an arbitration under a written arbitration agreement that a particular issue as to jurisdiction of the arbitrator and his right to decide a particular issue under the submittal agreement the court pointed out that the party did not only have a right to have that issue (which contract was binding) determined by a judicial tribunal but that the party had a constitutional right to have that issue so decided. The court quoted with approval Chief Judge Cardozo then sitting on the New York Court of Appeals and mentioned him by name:

> ". . . 'Arbitration presupposes the existence of a contract to arbitrate. If a party to a controversy

denies the existence of the contract and with it the jurisdiction of the irregular tribunal, the regular courts of justice must be open to him at *some* stage for a determination of the issue. *The right to such a determination, either at the beginning or at the end of the arbitration or in resistance to an attempted enforcement of the award, is assured by the Constitution as part of its assurance of due process of law.'* " (Emphasis supplied.) (*Finsilver, Still & Moss, Inc. vs. Goldberg, Maas & Co., Inc.*, 253 N.Y. 382, 171 N.E. 579 (1930) at page 389.)

New York State amended its Arbitration Act in 1937 to meet the situation described in the *Finsilver* case (quoted and cited above) by integrating its civil practice act into its arbitration procedure to thereby allow a party to preliminarily challenge jurisdiction or to participate and waive it. See *Matter of Harris* (*E. India Trading Company*), 16 Misc. 2d 87, 144 S. 2d 894 (1955) at page 89.

The principle developed in the quotation from the *Finsilver* case set out above by Mr. Justice Cardozo is still fundamentally sound today. There must be access to the judicial system at some point. In *Harleysville vs. Adair,* supra, the Pennsylvania Supreme Court refused to allow interlocutory intervention into uninsured motorist arbitration proceedings. It did state that the contestants have a right under the Arbitration Act of 1927 to file a petition under sections 169 and 170 of that act to the Court to vacate, modify or correct an uninsured motorist arbitration award. The right to file such a petition is a statutory right. No such right existed or exists under common law.

I. The Conduct of Arbitrations Under the Uninsured Motorist Endorsement in the American Arbitration Association Presumes as Part of the Basic Procedure That the Pennsylvania Arbitration Act Applies to This Type of Arbitration

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The Courts of Common Pleas have readily entertained petitions to them made under the Pennsylvania Act of 1927, Sec. 166 (Act of April 15, 1927, P. L. 381, 5 P.S. Sec. 166), for leave to issue subpoenas to compel the attendance of uninsured motorists and other witnesses at arbitration hearings. See unreported Court of Common Pleas of Philadelphia County, Pennsylvania cases: *In re Arbitration between Israel Markovitz and Joseph C. Hutchinson, Claimant and St. Paul Mercury Insurance Company,* Court of Common Pleas of Philadelphia County No. 4, December Term, 1966, Number 1107 where leave to issue a subpoena was requested. Hon. Peter Hagan, Pres. Judge, allowed the Rule; Hon. Edward J. Griffiths, after a hearing granted the Rule; and Hon. Joseph E. Gold, Pres. Judge, granted a motion for sanctions and an attachment on a recalcitrant witness who refused to honor a subpoena to attend and give testimony at an uninsured motorist arbitration before an arbitrator in the American Arbitration Association. And *William Trost, Jr., a minor by his Father and Natural Guardian, William J. Trost vs. Harleysville Mutual Insurance Company,* Court of Common Pleas of Philadelphia, November Term, 1967, No. 54, where Hon. Vincent A. Carroll, Pres. Judge, and Administrative Judge, and Hon. Charles A. Waters both granted petitions under the Pennsylvania Arbitration Act, same section as cited above, for a party to an arbitration to issue

subpoenas to compel the attendance of both the uninsured motorist and eyewitnesses to an accident from which the claim being arbitrated arose.

Your petitioner knows of no application to any court in the Commonwealth of Pennsylvania for assistance or aid under the Pennsylvania Arbitration Act in uninsured motorist arbitrations in the American Arbitration Association that were not entertained. In the two cases above cited, the applications were opposed but the courts entertained them anyway.

In the Accident Claims Tribunal of the American Arbitration Association, the arbitrators who sit as arbitrators in uninsured motorist cases routinely issue subpoenaes which not only purport to be issued by virtue of the judicial power of the state but indicate that the arbitrator who is issuing the subpoena is acting under the *Arbitration Law* of the state. Books and records are sought by a similar subpoena using the familiar term of Pennsylvania Law, *duces tecum.*

The uninsured motorist arbitrations are conducted formally, court reporters are frequently present, all witnesses are sworn to the usual judicial oath before they are examined and all witnesses are cross-examined by counsel subject to the usual objections which the rules of evidence dictate. Frequent and extensive legal openings, summations and closings are made to the arbitrators. Briefs are prepared in regard to the law of the case. These hearings are not informal gatherings in the back room of an insurance company somewhere, to try to reach some mutual understanding. They have all the air of an adversary proceeding. The claimant counsel enters the forum with

an intent to maximize his client's recovery and he makes use of all the forensic techniques available to him in a court of law. All the elements of damage common to a negligence lawsuit including the nebulous concept of "pain and suffering" are provable at these hearings and are considered as being matters upon which the arbitrator can base his award. If implied intent to invoke the Pennsylvania Arbitration Act is as the court says it is in *J. A. Robbins, Inc. vs. Airportels, Inc.* (cited above), a criterion to determine whether an arbitration is under the Arbitration Act such intent can certainly be found in even a routine examination of the proceedings surrounding this important and growing class of arbitration. It would seem from such an examination that the only time that any assumption arises that the uninsured motorist arbitrations are not under the Arbitration Act is when the award is filed.

Then the claimant and his counsel and the courts bend over backwards to find ways to refuse review. This leads to a game of legal "musical chairs" and often as in the instant case to a serious deprivation of the respondent company's right to fair treatment in the courts and to due process of law.

In the opinion of the Superior Court of Pennsylvania (Appendix B, p. 54), the court cites *Keller vs. Local 249,* 423 Pa. 353, 223 A. 2d 724 (1966), as a holding occurring after the rendition of the *Harleysville vs. Adair,* supra, decision, which it considers as dispositive of the argument that in *Harleysville vs. Adair,* supra, the Supreme Court of Pennsylvania granted a right to procedural relief under the Pennsylvania Arbitration Act of 1927. Yet, a reading of that decision reveals that it stands "four square" on

the Supreme Court of Pennsylvania's holding in *J. A. Robbins, Inc. vs. Airportels,* 418 Pa. 257, 210 A. 2d 896 (1965), and in no way alters the rule that parties to an arbitration agreement can "impliedly" incorporate the provisions of the Pennsylvania Arbitration Act of 1927 announced in the *J. A. Robbins, Inc. vs. Airportels* case, supra.

And lastly, in the opinion of the Superior Court of Pennsylvania (Appendix B, p. 54), the court cites *National Grange Mutual Ins. Co. vs. Kuhn,* 428 Pa. 179, 236 A. 2d 758 (1968), as a holding which it considers as dispositive of your petitioner's argument for relief. Yet a reading of that decision reveals that it stands solely for the proposition that the arbitrator acting under the standard arbitration clause of the uninsured motorist endorsement has power to decide coverage problems in addition to determining liability and damages.

Nowhere is there any case law in the Commonwealth of Pennsylvania which is contra to the arguments advanced by your petitioner in support of the procedural relief it sought from the courts of that state in the instant case. Yet relief has been denied. Your petitioner submits that this is a classical example of a denial of due process of law.

In its petition for leave to appeal to the Supreme Court of Pennsylvania (a copy of which is contained in the official transcript of the record of the Supreme Court of Pennsylvania which has been filed in this case) on page 6 et seq., your petitioner pointed out to the Supreme Court of Pennsylvania that the rule that it has announced as governing the application of the Pennsylvania Arbitration

Act of 1927 in the *J. A. Robbins Co., Inc. vs. Airportels, Inc.,* 418 Pa. 257, 210 A. 2d 896 (1965), and which it has repeatedly reiterated, requires a factual determination of whether or not the Pennsylvania Arbitration Act of 1927 has or has not been impliedly incorporated into a specific arbitration agreement; and that in regard to such factual determinations, a party is entitled to a jury trial. To allow a court merely to dispose of a case by saying it doesn't think the parties impliedly incorporated the Pennsylvania Arbitration Act of 1927 is to accord to such a court the power to determine *facts* that is completely foreign to Anglo-American jurisprudence. The travesty of such a proceeding is even more apparent as in the instant case where your petitioner presented extensive information. The Court's attention is called to Point Three for Appeal and Point Four for Appeal contained on pages 5 and 6 of your petitioner's petition addressed to the Supreme Court of Pennsylvania requesting leave to appeal to that court, which petition is contained in the transcript of the record of the Supreme Court of Pennsylvania which has been filed in this case, in which the nature of the uninsured motorist arbitrations and the procedures followed in these arbitrations is set out in extenso.

As your petitioner has argued throughout this petition, the doctrines of law and the jurisprudence of the very Court from which it sought relief, the Supreme Court of Pennsylvania, supports its contentions. Yet, that court has refused to apply its own doctrines to the case as have the lower courts subject to its jurisdiction. Such a denial is a fundamental denial of due process of law guaranteed by the Fourteenth Amendment of the United States Constitution.

CONCLUSION AND REASON FOR GRANTING THE WRIT

Your petitioner has been denied due process of law and has been deprived of valuable contract rights by decisions of the lower courts of the Commonwealth of Pennsylvania and has been denied a hearing requested on constitutional grounds by the Supreme Court of Pennsylvania. The matter concerns not only its own policies numbering in the hundreds of thousands but all automobile liability policies issued in Pennsylvania by any insurance company doing business there. We respectfully request that a writ of certiorari issue to the Supreme Court of Pennsylvania and to the Superior Court of Pennsylvania granting a review of these State Court proceedings in this matter.

PAUL A. LOCKREY, ESQUIRE,
PAUL A. LOCKREY,
Counsel for Harleysville Mutual Insurance Company, Petitioner.

APPENDIX

APPENDIX A

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

No. 3610 March Term, 1967

Oscar Johnson

vs.

Harleysville Mutual Casualty Company

Catherine G. Barone, Esq., for Plaintiff.

Paul A. Lockrey, Esq., for Defendant.

OPINION

Waters, J., October 11, 1967.

Plaintiff, after an award in his favor under the uninsured motorist coverage clause in his insurance policy, entered judgment against the defendant insurance company in the amount of $6,500, representing the amount of

the award, $6,450, plus $50 administrative fee paid by him to the American Arbitration Association. Defendant filed a petition to open the judgment, alleging that the order for judgment was improper and contrary to law because it had been entered without petition to the court and deprived the defendant of a statutory right to seek review of the award. The rule to show cause issued pursuant to this petition having been discharged, defendant has appealed to the Superior Court.

The issue posed by the pleadings is whether the arbitration here involved was under the common law or pursuant to the Arbitration Act of April 25, 1927, P. L. 381, 5 P.S. 161 et seq. The act of 1927 did not displace arbitration under the common law: Freeman v. Ajax Foundry Products, Inc., 398 Pa. 457 (1960); and "when the agreement to arbitrate does not itself determine whether the Act of 1927 or common law rules are controlling . . . and when there is no evidence that both parties subsequently agreed, either expressly or by implication, to apply the Act, common law rules must control the enforcement of the award": John A. Robbins Company, Inc. v. Airportels, Inc., 418 Pa. 257, 262 (1965), as quoted in Keller v. Local 249, 423 Pa. 353, 355 (1966). "Likewise, common law rules must control the scope of review of the award. Wingate Construction Company v. Schweizer Dipple, Inc. [419 Pa. 74 (1965)]"; Keller v. Local 249, supra, p. 355. We concluded that this was arbitration under the common law, not only because of the absence of any agreement to the contrary, but because of the express language contained in the policy: ". . . the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the

American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this Part."

This clearly indicated common law arbitration, and authorized entry of judgment in favor of the prevailing party. The defendant could have filed a petition to vacate the award on the ground of "fraud, misconduct, corruption or other such irregularity which caused the arbitrator to render an unjust, inequitable and unconscionable award" (cf. Keller v. Local 249, supra), but it did not do so. The arbitration award was made on March 17, 1967, and judgment was entered April 20, 1967, more than a month later. Thereafter defendant filed its petition to open the judgment, expressly for the purpose of being permitted to file a motion to set aside, vacate, modify or correct the award pursuant to the Arbitration Act of 1927. Since we were convinced, as stated above, that this was common law arbitration, not subject to the provisions of the statute, we discharged the rule to open the judgment.

Our attention was directed to Harleysville Mutual Casualty Co. v. Adair, 421 Pa. 141 (1966), but we do not feel that that case is dispositive of the issue whether the contract therein called for common law or statutory arbitration. That case held merely that the court of common pleas had properly dismissed a complaint in equity seeking an injunction to restrain arbitration proceedings until after the completion of the company's pretrial discovery. The question whether the arbitration was common law or under the statute was not raised or decided, though there

is dictum in the final paragraph (p. 146) to the effect that the Act of 1927 provides a method of statutory relief. On the other hand, the question before us for decision in the instant case appears to have been decided definitely in Owens v. Concord Mutual Insurance Co., 210 Pa. Superior Ct. 235 (1967), in which the court held that where the parties do not agree to apply the Act of 1927 to arbitration proceedings, common law rules control the enforcement of the award and the scope of review.

Waters,
J.

APPENDIX B

IN THE SUPERIOR COURT OF PENNSYLVANIA
Philadelphia District

No. 899 October Term, 1967

Oscar Johnson

vs.

Harleysville Mutual Casualty Company,
Appellant

Appeal from the Order of the Court of Common Pleas of Philadelphia County at No. 3610 *March Term,* 1967

OPINION

By Jacobs, J.

Filed: March 20, 1968

This is a companion case to Smith v. Safeguard Mut. Ins. Co., Pa. Superior Ct. , A. 2d (1968), in which an opinion was filed today. Appellee claimed damages under the uninsured motorist provision of a policy issued by appellant. The dispute was submitted to ar-

bitration pursuant to the same arbitration clause recited in full in the Smith case.[1] An Award was made by the arbitrator for the appellee who caused judgment to be entered on the award in substantially the same manner it was done in the Smith case. However, instead of moving to strike the judgment as was done in the Smith case, here the appellant moved to open the judgment in order that it might attack the award pursuant to the provisions of the Arbitration Act of April 25, 1927, P. L. 381, 5 P.S. §161 et seq. The court below dismissed the motion holding that this was common-law arbitration not arbitration under the Act of 1927. We agree.

The sole issue raised on this appeal is whether the instant arbitration is subject to the provisions of the Arbitration Act of 1927. We have already answered this question in the negative in the Smith case and need not repeat what we said there. However, appellant directs our attention to the concluding paragraph of Harleysville Mut. Cas. Co. v. Adair, 421 Pa. 141, 218 A. 2d 791 (1966), which says, "Finally, the Arbitration Act of 1927, supra, §§7 and 10, 5 P.S. §§167, 170, provide a complete method of statutory relief by appeal to the court to vacate, modify or correct an award where the arbitrators exceed their powers or refuse to hear evidence or by misbehavior prejudice the rights of a party." Id. at 146, 218 A. 2d at 794. Since Adair apparently involved the same arbitration provision here considered, this language would seem to support the argument that judgment may not be entered until a court approves the award pursuant to §§167 and 170 of the Arbitration Act. For several reasons we do

[1] Except that this policy refers to the clause as a "part" rather than an "endorsement".

not feel compelled to accept that conclusion. First, the quoted paragraph was incidental to the holding of Adair (that equity will not enjoin an arbitration, which has commenced under American Arbitration Association rules, to permit a party to exercise the pretrial discovery rules of civil procedure). Second, the Supreme Court has, since the Adair decision, expressly reaffirmed the general rule that the common law controls the agreement and award when the parties, as here, do not agree expressly or impliedly that the Act of 1927 shall apply. Keller v. Local 249, 423 Pa. 353, 223 A. 2d 724 (1966). Third, the Supreme Court apparently agrees in National Grange Mut. Ins. Co. v. Kuhn, Pa. , A. 2d (1968), that the same arbitration provision as here considered is subject to common law rules of review.

We thus conclude that the lower court's dismissal of the appellant's motion to open judgment, which is the only matter before this court, was correct.

Affirmed.

APPENDIX C

SUPREME COURT OF PENNSYLVANIA

Eastern District
Philadelphia 19107

September 25, 1968

Paul A. Lockrey, Esq.,
1922 Philadelphia Nat'l. Bank Building
Broad and Chestnut Streets
Philadelphia, Pa. 19107

In re: Oscar Johnson vs. Harleysville Mutual Casualty Company, Petitioner

No. 150-A Miscellaneous Docket No. 16

(No. 899 October Term, 1967)

Dear Mr. Lockrey:

Please be advised that the Court has entered the following Order on your Petition for Allowance of Appeal from the Judgment of the Superior Court, in the above captioned matter:

"September 25, 1968
Denied, Per Curiam,
Jones, J."

The printed Record submitted with your Petition is returned to you herewith.

Yours very truly,
Patrick N. Bolsinger
Prothonotary

PNB:mb
CC: Catherine G. Barone, Esq.

APPENDIX D

CONSTITUTIONAL PROVISIONS RELIED UPON

UNITED STATES CONSTITUTION

Amendment XIV—Citizenship; privileges and immunities; due process; equal protection; apportionment of representation; disqualification of officers; public debt; enforcement.

Section 1—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S.C. Constitution, Amend. XIV, Sec. 1

CONSTITUTION OF PENNSYLVANIA

Article 1, Section 17—Ex post facto laws, impairment of contracts.

No ex post facto law, nor any law impairing the obligation of contract, or making irrevocable any grant of special privilege or immunities, shall be passed.

Purdon's Penna. Statutes Annotated Const. Article 1, Section 17.

APPENDIX E

SUPERIOR COURT OF PENNSYLVANIA

Philadelphia District
Philadelphia, Pa. 19107

November 1, 1968.

Paul A. Lockrey, Esq.,
1922 Phila. National Bank Bldg.,
Philadelphia, Penna., 19107.

Re: Oscar Johnson v. Harleysville Mutual Casualty Company, Appellant
No. 899 October Term, 1967

Dear Mr. Lockrey:

The Court has entered the following Order on Appellant's Petition for Supersedeas in Order to File Petition for Writ of Certiorari with the Supreme Court of the United States, filed in the above entitled appeal:

> "And Now, to wit, this 1st day of November, 1968, upon consideration of the within Petition of Appellant for Supersedeas in Order to File Petition for Writ of Certiorari with the Supreme Court of the United States, and Answer thereto, at appeal No. 899 October Term, 1967, it is ordered that the prayer of said petition be, and the same is hereby denied.
>
> Per Curiam."

Very truly yours,
George W. Dunn, Jr.
Deputy Prothonotary

CAH:RWH
cc: Catherine Gallagher Barone, Esq.

APPENDIX F

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

November 14, 1968

Paul A. Lockrey, Esquire
1922 Philadelphia National Bank Building
Broad & Chestnut Streets
Philadelphia, Pennsylvania 19107

Re: Harleysville Mutual Casualty Co. v. Johnson,
O. T. 1968

Dear Sir:

Your application for stay in the above-entitled case, together with the appellee's opposition thereto, was presented to Mr. Justice Brennan who on November 13th denied the application.

Very truly yours,
John F. Davis,
Clerk
By E. P. Cullinan
E. P. Cullinan
Chief Deputy

EPC:lsr
cc: Miss Catherine G. Barone
Attorney at Law
1115 Fort Wash. Avenue
Fort Washington, Pa.